Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Ninth Circuit Court of Appeals invoked this Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and the foreign affairs field preemption doctrine to render unconstitutional a California statute extending the statute of limitations for claims to recover Nazi-looted artworks. In so doing, the court misconstrued *Garamendi* and extended the rarely-utilized dormant foreign affairs power well beyond this Court's holding in *Zschernig v. Miller*, 389 U.S. 429 (1968). The Ninth Circuit's decision raises exceptionally important issues for resolution by this Court.

1. In enacting a state statute extending the statute of limitations applicable to claims for the recovery of property stolen during the Holocaust against museums and galleries, was the State of California addressing an area of "traditional state responsibility" without intruding on the federal foreign affairs power?

2. Is a state statute extending the statute of limitations for the recovery of property stolen during the Holocaust, which does not conflict with any federal statute, treaty or policy, preempted by the federal foreign affairs power to make and resolve war?

3. Is the decision of the Ninth Circuit in direct conflict with this Court's prior decisions because it found California Code of Civil Procedure § 354.3 facially unconstitutional when the application to the case at bar poses no constitutional infirmity?

LIST OF PARTIES

Petitioner Ms. von Saher is an individual residing in Connecticut.

Respondents Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation are both California public benefit corporations.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's January 14, 2010 Order Amending Opinion and Denying the Petitions for Rehearing and for Rehearing En Banc and Amended Opinion is reported at 592 F.3d 954 (9th Cir. 2010) and reprinted in the Appendix at 1a-38a. The Ninth Circuit's August 19, 2009 Opinion affirming the District Court's holding that Cal. Code Civ. Proc. § 354.3 is unconstitutional is reported at 578 F.3d 1016 (9th Cir. 2009) and reprinted in the Appendix at 39a-74a. The Opinion of the District Court granting Respondents' motion to dismiss is not reported in F. Supp. 2d, and is reprinted in the Appendix at 75a-83a.

BASIS FOR JURISDICTION

The order of the Ninth Circuit Court of Appeals was entered on August 19, 2009. A timely petition for rehearing and rehearing en banc was denied on January 14, 2010. The petition for certiorari was filed within ninety days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As the constitutionality of a California statute is at issue, and neither the State nor any agency, officer or employee thereof is a party hereto, 28 U.S.C. § 2403(b) may apply, and this petition will be served upon the Attorney General of the State of California. There is no indication on the court docket that the United States District Court for the Central District of California certified to the State Attorney General the fact that the constitutionality of a California statute was drawn into question. The California Attorney General appeared as Amicus Curiae in both the District Court and the Court of Appeals in support of the California statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of Cal. Code Civ. Proc. § 354.3 is set forth in the Appendix at 91a. The relevant text of Article I, Sections 8 and 10, Article II, Section 2, Article VI and the Tenth Amendment of the United States Constitution are set forth in the Appendix at 84a-90a.

STATEMENT OF THE CASE

The state statute at issue, California Code of Civil Procedure § 354.3, extended the statute of limitations applicable to actions against museums and galleries for the recovery of Nazi-looted art. Although the Ninth Circuit expressly found that § 354.3 does not conflict with any specific federal statute, treaty or policy, thus distinguishing it from the statute at issue in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the court, relying on *Garamendi* and the fact that the California legislature did not limit the scope of § 354.3 to museums and galleries physically located in California, nevertheless incorrectly held that the state had no "traditional state interest" in enacting § 354.3 and that the statute intruded upon the Federal Government's power to make and resolve war in violation of the foreign affairs field preemption doctrine recognized in *Zschernig v. Miller*, 389 U.S. 429 (1968). In so doing, the Ninth Circuit extended the field preemption doctrine recognized in *Zschernig* beyond the limitations set for that case in subsequent decisions. In *Garamendi*, the Court put off a reexamination of *Zschernig* to another day. The decision of the Ninth Circuit in *Von Saher* makes it necessary for the Court to reexamine *Zschernig* and the field preemption doctrine in order to determine its proper contours.

Not only is it clear that § 354.3 does not implicate or intrude upon federal power, but, quite the contrary, it is plain that the enactment of the statute is consistent with the Federal Government's policy. It has long been the express position of the United States that property looted during the Holocaust era should be returned to its rightful owners and the possessors of such artworks should be discouraged from asserting technical defenses, such as the statute of limitations, so that claims to these artworks may be judged upon their merits. Review by the Supreme Court is, therefore, critical because the Ninth Circuit's decision interferes with the Federal Government's position with respect to the return of Nazi-looted art and the power of states to regulate statutes of limitations consistent with that position.

Finally, it is important to underscore that, in this case, the respondents and the art in question are physically located in California. The Ninth Circuit, therefore, failed to apply this Court's longstanding rule that a statute should not be struck down as facially unconstitutional when a suitable limiting construction is available.

The California Statute At Issue

The California Legislature has recognized the unique nature of claims for the return of artworks looted during World War II ("WWII") and the roadblocks that make pursuing these claims so difficult. Those who seek legal redress for the theft of artworks during WWII must engage in detailed investigations, often in several countries, obtain translations of foreign historical documents and seek the assistance of legal and historical

experts, among other things, all of which may take many years to complete. Seeking the return of looted artworks also inevitably forces victims and their heirs to relive the horrors associated with that era. Claimants are often thwarted in their efforts to regain their property because present day possessors resort to statutes of limitations and other technical defenses despite undeniable proof of an earlier Nazi confiscation.

As a result, in 2002 the California Legislature exercised its traditional role of providing limitations periods by unanimously enacting § 354.3 to extend the statute of limitations for claims for the return of Nazi-looted artworks brought in California against museums or galleries. This modification of the statute of limitations prevents museums and galleries — which should know the importance of provenance and are in the best position to discover whether an artwork they are acquiring is among the thousands looted during WWII — from taking advantage of a technical defense to a meritorious claim for the return of stolen artworks.

The Nazi-Looted Artworks In The Possession Of A California Museum

This action was brought by petitioner, Marei von Saher, to recover an extraordinary pair of life-size paintings entitled "Adam" and "Eve" by Lucas Cranach the Elder (the "Cranachs"). The Cranachs are currently on display at the Norton Simon Museum of Art at Pasadena. App. 8a.

Ms. von Saher is the sole living heir of the noted Jewish art dealer, Jacques Goudstikker. It is undisputed

that following the Nazi invasion of the Netherlands in May 1940, the Nazis, led by Reichsmarschall Hermann Göring, looted Goudstikker's gallery of more than one thousand artworks, including the Cranachs, which he took for his personal collection. App. 9a.

After WWII, the Cranachs, along with other artworks stolen from Goudstikker's gallery, were recovered by the Allies and, in accordance with Allied policy, returned to the Netherlands with the expectation that they would be restituted to their rightful owner. Although Goudstikker's widow did recover some works, the Dutch government retained the Cranachs and other artworks looted by Göring. App. 9a-10a.

In 1961, Georges Stroganoff-Scherbatoff ("Stroganoff") claimed that the Cranachs had belonged to his family and that the Dutch government did not have any right, title or interest in them. In fact, the Cranachs came from the Church of the Holy Trinity in Kiev, and Goudstikker purchased them at an auction in 1931. They had never been part of the Stroganoff family art collection. Nevertheless, in 1966 the Dutch government sold the Cranachs to Stroganoff. App. 9a-10a.

In or about 1971, the Norton Simon Museum of Art at Pasadena and/or the Norton Simon Art Foundation (collectively, the "Museum") acquired the Cranachs either from Stroganoff or from an art dealer acting as Stroganoff's agent. The Cranachs have apparently been in the possession of the Museum since that time. Ms. von Saher discovered that the Cranachs were on display at the Museum in or about November 2000. Although

Ms. von Saher repeatedly demanded that the Museum return the Cranachs to her, and agreed to a tolling of the statute of limitations while the parties pursued voluntary mediation, the Museum refused to do so.

Ms. von Saher has recovered other works from her family's looted art collection, including hundreds of works returned by the Dutch Government. In 2001, the Dutch Government determined that its post-War policies respecting the restoration of Nazi-looted property had been too formal and bureaucratic and that, going forward, it would review claims for such property based upon a more policy-oriented approach. Following this policy change, on February 6, 2006, the State Secretary of the Dutch Government's Ministry for Education, Culture and Science, decided to restitute 200 artworks looted from Goudstikker to Ms. von Saher. The State Secretary specifically found:

> that grounds for restitution exist in this particular case in accordance with the committee's recommendation. In so doing I am especially mindful of the facts and circumstances relating to the involuntary loss of property . . . . With regard to the 'Göring transaction', the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to those works were never waived. . . . Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

If the Cranachs had still been in the custody of the Dutch Government in 2006, they, too, would have been returned.

The Decisions Below

Ms. von Saher filed her complaint in the United States District Court for the Central District of California on May 1, 2007. It sets forth causes of action for replevin and conversion, damages under Cal. Penal Code § 496, a judgment declaring Ms. von Saher to be the lawful owner of the Cranachs, and to quiet title. The complaint alleges that it was timely brought pursuant to § 354.3. The District Court had subject matter jurisdiction over the claims pursuant to federal diversity jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1332, as the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and there is complete diversity of citizenship between petitioner, a Connecticut citizen, and respondents, who are both California citizens.

The District Court granted the Museum's motion to dismiss the complaint with prejudice. Likening § 354.3 to a different California statute that, *inter alia*, extended the statute of limitations to bring claims for slave and forced labor against companies for whom that labor was performed during WWII, or their successors, the District Court held that § 354.3 "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims," and is therefore unconstitutional. App. 81a-82a (citing *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003)). The District Court also held that, in the absence of § 354.3, Ms. von Saher's predecessor-in-interest had

only three years under California's traditional statute of limitations to bring a claim from the time the Museum acquired the Cranachs in 1971, irrespective of when Ms. von Saher or her predecessor-in-interest discovered their whereabouts. App. 82a.

On appeal, the Ninth Circuit determined that § 354.3 does not conflict with any specific federal statute, treaty or policy. App. 19a. The majority concluded, however, that because § 354.3 could apply to museums and galleries located outside of California, the Legislature's interest in enacting § 354.3 was not to protect its residents and regulate its art trade, but rather to create "a world-wide forum for the resolution of Holocaust restitution claims," which it held was not a "traditional state responsibility." App. 23a-25a. Having found that California was not exercising a traditional state function, the majority determined that § 354.3 was preempted by the foreign affairs power reserved to the Federal Government because the intent of the statute was to rectify wartime wrongs.[1] App. 26a-27a. Significantly, the court conceded that, had § 354.3 been limited to museums physically located in California, the state would have been acting within its traditional competence, foreign affairs field preemption would be inapplicable, and § 354.3 would have been constitutional. App. 23a.

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1. The Ninth Circuit reversed so much of the District Court decision as held that Ms. von Saher's claims would also be barred under California's traditional statute of limitations for actions to recover stolen property and granted her leave to amend her complaint to allege timeliness under Cal. Code Civ. Proc. § 338. App. 35a.

REASONS FOR GRANTING THE PETITION

Having found that § 354.3 "does not . . . conflict with any current foreign policy espoused by the Executive Branch" (App. 19a), the majority in *Von Saher* nevertheless concluded that *Garamendi* required a finding that § 354.3 did not address an area of "traditional state responsibility" and was "therefore subject to a field preemption analysis." App. 25a. The court misconstrued *Garamendi*'s analysis of "traditional state responsibility." Among other things, the *Von Saher* majority failed to recognize that the *Garamendi* decision was based on a clear and substantial conflict between "express federal policy" and the state statute, and the dictum concerning the strength of the state's interest did not in any way suggest that the state had no legitimate interest in enacting § 354.3 solely because its purpose was to "provide relief to Holocaust victims and their heirs." App. 22a.

In straining to analogize the asserted state interest underlying § 354.3 with the *Garamendi* dictum, and then seeking to justify field preemption under *Zschernig*, the Ninth Circuit declared unconstitutional a statute well within California's traditional competence by divining a legislative intent belied by the legislative record and incorrectly finding that it was preempted by the federal war power. In so doing, the decision in *Von Saher* has taken from the states the right to modify their own statutes of limitations, merely because the modification touches upon the subject of the Holocaust and applies to both resident and out-of-state defendants, even where there is no federal statute, treaty or policy in conflict with the state statute.

The *Von Saher* majority not only misconstrued *Garamendi*, but also took foreign affairs field preemption farther than any other decision, including both *Garamendi* and *Zschernig*. The Ninth Circuit's decision depends heavily on the continued validity, indeed upon the expansion of, the dormant foreign affairs doctrine given life in *Zschernig*, a case previously thought moribund or applicable only in limited circumstances. It is critical that this Court once and for all settle the question of the continued vitality of a broad foreign affairs field preemption, especially now that the Ninth Circuit has opened the door to an expansion of that doctrine, putting into jeopardy California's effort to deal with Nazi loot found in museums in or doing business in the state, and also stymieing other states from making similar efforts.

Moreover, the Ninth Circuit's decision actually conflicts with the express federal policy with respect to the restitution of looted Holocaust property. If left in place, the decision will have the inevitable effect of thwarting that policy and preventing other states from assisting the U.S. in effectuating it. The clearly enunciated position of the United States is that "artworks displaced during the 1933-1945 period should be returned to rightful owners," *see* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html; and that possessors of such property should be discouraged from asserting statutes of limitations and other technical defenses to prevent or impede the resolution of claims for the return of such property. *Id.*; *see also* Stuart E.

Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm. Thus, it is critical that this Court review the Ninth Circuit's decision in order to prevent its negative impact on these federal pronouncements.

Finally, given the Ninth Circuit found § 354.3 would be constitutional if limited only to defendants physically located within the state, it was improper for it to rule the statute facially unconstitutional. Proper application of Supreme Court jurisprudence requires that only any unconstitutional application of the statute be enjoined, leaving the remainder of the statute — applicable to the case at bar — intact.

I. By Misconstruing *Garamendi* And The Legislative History Of § 354.3, The Ninth Circuit Wrongly Concluded That § 354.3 Does Not Address A Traditional State Responsibility

In order to justify its finding that California had no legitimate state interest in enacting § 354.3, the Ninth Circuit misconstrued *Garamendi* and mischaracterized the enactment of § 354.3 as an effort to "create[] a world-wide forum for the resolution of Holocaust restitution claims." App. 25a. The majority made clear that, had § 354.3 been limited to museums and galleries physically located in California, there would be no question that the Legislature had been acting within its legitimate state interest. App. 23a. Thus, based solely on the fact

that § 354.3 could apply to a museum outside of California, the Ninth Circuit found, not that California had a weakened interest, but that it had no traditional state interest at all in enacting § 354.3.

Any reasonable reading of § 354.3, however, recognizes that it can apply only to museums and galleries subject to California's jurisdiction. App. 36a-37a. If, as the *Von Saher* majority concluded, California "has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art" (App. 23a), it has an equally legitimate interest in regulating museums and galleries that come into California to transact business, thereby subjecting themselves to California's jurisdiction. Thus, California's traditional state interest is well served by § 354.3.

A. *Garamendi* Did Not Hold Or Suggest That A State's Legitimate Interest In Enacting Legislation Is Nullified By A Concern for Holocaust Victims

The question in *Garamendi* was whether California's Holocaust Victim Insurance Relief Act ("HVIRA") "interferes with the National Government's conduct of foreign relations." *Id.*, 539 U.S. at 401. HVIRA required life insurance companies doing business in California to disclose information regarding their policies and related entity policies issued before and during the Nazi era. This Court held that HVIRA directly conflicted with the presidential policy expressed in the July 2000 Agreement Concerning the Foundation "Remembrance, Responsibility, and Future," 39 Int'l

Legal Materials 1298 (2000), that all issues relating to Holocaust-era insurance policies were to be resolved exclusively through the International Commission on Holocaust-Era Insurance claims ("ICHEIC"). *Garamendi*, 539 U.S. at 421 ("As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information."). The Court held that the conflict between HVIRA and the presidential policy determination to resolve Holocaust insurance issues through ICHEIC was so clear that, regardless of the strength or weakness of the state interest, the former must yield to the latter.

In *Von Saher*, however, the Ninth Circuit, after embarking on an analysis of express U.S. pronouncements, found that there was no actual conflict between § 354.3 and any federal law, treaty or policy. The Ninth Circuit, relying on a footnote in *Garamendi*,[2] then concluded that § 354.3 could only be held unconstitutional on the basis of the foreign affairs field preemption doctrine, but that the doctrine could only be applied if the court first found that California had "no serious claim to be addressing a traditional state responsibility" in enacting § 354.3. App. 24a (quoting *Garamendi*, 539 U.S. at 419 n.11).

2. The *Garamendi* Court stated that "field preemption might be the appropriate doctrine" if the state were to act on a matter of foreign policy without any claim to be addressing a traditional state responsibility. *Id.*, 539 U.S. at 419 n.11. As shown in Point II below, California did not "take a position on a matter of foreign policy," *id.*, but merely modified a statute of limitations to apply to claims in California courts.

By erroneously relying on dictum in *Garamendi*, the majority determined that California had no legitimate state interest in extending the statute of limitations for the recovery of stolen Holocaust property merely because that statute applied to non-resident defendants that were subject to jurisdiction in the state, as well as those physically located within the state. Having concluded that the application of the field preemption doctrine was justified, the Ninth Circuit found § 354.3 unconstitutional because it intruded on the Federal Government's war power.

Garamendi provides no support for the Ninth Circuit's conclusion that California acted outside of its legitimate competence in enacting § 354.3. In *Garamendi*, this Court concluded that, since HVIRA involved a limited disclosure about a small number of policies written by foreign insurers more than 60 years ago, it did not aid in the general evaluation of corporate reliability in contemporary insuring. The state insurance commissioner's contention that HVIRA was a typical "blue sky" disclosure regulation was, therefore, disingenuous and evidenced a weak state interest. The *Garamendi* Court never suggested, however, that the fact that the state's true interest was to aid Holocaust victims abolished or weakened the state's interest. Rather, the Court concluded that the state's concern for its Holocaust victims did not overcome the weakness of its interest in imposing its insurance regulations upon entities (European affiliates of California companies) and transactions (insurance policies written in Europe between European parties) having no connection with the state. Put simply, HVIRA had the effect of regulating those entities and transactions, irrespective of whether

California had any contacts with them, solely on the basis of the existence of an uninvolved California affiliate.[3]

In *Von Saher*, the Ninth Circuit concluded that California had a stronger interest in enacting a statute that dealt with the problem of Nazi-looted art hanging on the walls of museums and galleries in the state than it did in enacting HVIRA, but found that the legitimate state interest disappeared because the statute also applied to claims against non-resident museums and galleries. But that finding is in no way compelled by *Garamendi*. Indeed, none of the concerns that troubled the Court in *Garamendi* are present in *Von Saher* because there is no regulation at stake in *Von Saher* and § 354.3 will only come into play once jurisdiction over a defendant is otherwise established. There is no chance of indirect regulation of entities not subject to California's legislative authority. Claims for the recovery of Nazi-looted art could always be brought against non-resident entities, so long as they were subject to California's jurisdiction, and § 354.3, which applies even handedly to all claims, as every statute of limitations, does nothing more than extend the time in which to do so.

3. The *Garamendi* court also asked what the result would be if vindicating the rights of Holocaust victims was, in and of itself, a powerful state interest and concluded that, it would still have to give way to the Federal Government's greater interest in vindicating the rights of victims throughout the country. Of course, a weighing of the state's interest as against the federal interest would not yield the same result in *Von Saher*, and indeed the Ninth Circuit found no such conflict. In *Garamendi*, HVIRA threatened the efficacy of the federal policy decision to support ICHEIC. In *Von Saher*, § 354.3 aids the Federal Government's express policy. Revising state statutes of limitations to permit the resolution of Holocaust property claims on the merits is not a different way of achieving the federal goals; on the contrary, it is a vital tool in the realization of that policy.

Thus, there is no basis in *Garamendi* to support a finding that California did not have a strong interest in enacting § 354.3, much less a finding that in enacting the statute, California was not acting within "an area of traditional state responsibility," a finding that the Ninth Circuit used to justify its inquiry into field preemption. But even if it could be said that the concern for Holocaust victims somehow weakened the state's legitimate interest in enacting § 354.3, under *Garamendi* (*id.*, 539 U.S. at 419 n.11) that would have led only to an analysis as to whether there is an actual conflict with express federal policy of a "clarity or substantiality" that compels the state statute to yield. *Id.* The Ninth Circuit, however, found that there was no conflict at all with any federal treaty, agreement or policy, and there was therefore no basis for conflict preemption. And that should have been the end of the inquiry.

B. The Express Legislative Intent Of § 354.3 Puts It Well Within California's Traditional State Interest

Section 354.3 was amended during the legislative process to cover museums and galleries outside of California. The majority surmised that this amendment demonstrated that the Legislature's intent was not to "regulat[e] the museums and galleries operating within its borders" — an admittedly legitimate state interest — but rather to create a "world-wide forum" for Holocaust restitution claims. There was no need, however, for the majority to guess the Legislature's intent. The actual legislative history is clear. Notes prepared for the April 9, 2002 hearing of the Assembly Committee on Judiciary state:

> As currently drafted, AB 1758 would apply only to a suit by a Holocaust victim to recover

artwork from a museum or gallery located in California. Attorney E. Randol Schoenberg, who represents a client in an action[4] to recover artwork taken in the Holocaust, has written to suggest the removal of the limitation of the bill to apply only in those cases involving museums and galleries in the state. Mr. Schoenberg states:

> For some reason, the proposed legislation is limited in application to museums or galleries "located in the State of California." This territorial limitation in section 354.7(a) should be eliminated. Jurisdiction over defendants in California courts is already restricted by the Constitution of California and of the United States, as set forth in Code of Civil Procedure Section 410.10 .... None of the other statute of limitation sections have jurisdictional limits on the location of defendants to whom the limitations rule applies.

Limitations of Actions: Holocaust Victims, AB 1758 (2002) at 5, *available at* http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1758_cfa_20020408_124547_asm_comm.html.

Further, notes prepared for the June 25, 2002 hearing of the Senate Judiciary Committee state:

> With regard to out-of-state defendants, the limits of a California court's jurisdiction would

4. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

> be determined by the "minimum contacts" test set forth by the U.S. Supreme Court in *International Shoe Co. v. Washington* (1945) 326 U.S. 310. . . . "Minimum contacts" means the relationship is such that the exercise of jurisdiction over the nonresident does not offend "traditional notions of fair play and substantial justice." Indeed, the doing of business within a state creates such a relationship as to make it reasonable for the state to require that the corporation defend suits brought against it there."
>
> In California, Witkin writes: "To justify the court's assumption of jurisdiction, the defendant's activity must consist of some act or transaction in the forum state 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.'" [2 Witkin, California Procedure, Jurisdiction (4th Ed. 1996), p. 158] . . . .
>
> Museums for which the test was satisfied would find their collections subject to recovery regardless of whether the piece of artwork itself had ever entered California. This result, however, would not be that different from corporations that find their out-of-state assets subject to a state judgment.

Limitation of Actions: Holocaust-Era Artwork, AB 1758 (2002) at 5-6, *available at* http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1758_cfa_20020626_092521_sen_comm.html.

Thus, the legislative history of § 354.3 demonstrates that the actual intent was to exercise the legitimate state interest of regulating entities that avail themselves of the privilege of transacting business in California and not to provide a world-wide forum for war reparations.

Just as the regulation of property is a traditional state function, the establishment of a statute of limitations for conversion of stolen property is quintessentially a traditional state function. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, § 354.3, which gives a plaintiff no cause of action that she did not previously have, but merely extends the time in which claims for stolen property can be asserted, addresses a traditional state responsibility. Indeed, California certainly has an interest in determining when an action by any victim of theft can be brought in order to recover stolen property and, where the statute of limitations is found to be inadequate with respect to claims for the recovery of Nazi-looted art, California certainly has an interest in and a right to modify its statute of limitations to correct that inequity.

The *Von Saher* decision leads to an anomaly that requires action by this Court. Possessors of Nazi-looted art are permitted to rely upon state statutes of limitations to avoid claims for restitution, and courts are bound to apply those state statutes, but according to the Ninth Circuit, the states that enacted these statutes are no longer able to change them. The state created the statute of limitations for conversion that applies in all cases where plaintiffs seek the recovery of stolen

property, including property stolen during the Holocaust, and this statute of limitations can be raised as a defense by all defendants, including non-resident defendants properly subject to jurisdiction in California. In its wisdom, California concluded that the statute of limitations in cases for the recovery of Nazi-looted property should be extended. Under *Von Saher*, however, defendants will be able assert the California statute of limitations, but California is without power to determine the length of the applicable statute of limitations, creating an improper and irrational limitation. The court's mistaken analysis of traditional state responsibility may well impede the enactment of similar statutes in other states.

It was illogical for the Ninth Circuit to conclude that by not limiting the statute's reach to resident defendants, the legislature somehow obliterated its admittedly legitimate state interest in regulating the statute of limitations in cases properly before its courts. It goes without saying that even if the statute had been so limited, the courts would still be in the position of resolving restitution claims arising out of WWII. So, it appears that the Ninth Circuit's concern was not really one of federal power, but rather, one of state policy, and that should most certainly be left to the legislature.

II. The Ninth Circuit Has Taken Foreign Affairs Field Preemption Farther Than Permitted Under The Supreme Court's Decisions In *Zschernig* And *Garamendi*

A. Even If A Field Preemption Inquiry Had Been Warranted, There Would Be No Basis For The Ninth Circuit's Holding That § 354.3 Was Preempted By The Foreign Affairs Power

Having erroneously found that § 354.3 did not address a legitimate state interest, the Ninth Circuit embarked upon a field preemption analysis. But even if it were appropriate to apply the foreign affairs field preemption doctrine to a statute that addresses a legitimate state interest, the Ninth Circuit erred in its conclusion that § 354.3 is unconstitutional because it was enacted "with the aim of rectifying wartime wrongs committed by our enemies," and therefore is an intrusion into the Federal Government's exclusive power to make and resolve war. App. 26a. In this respect, the decision impermissibly expanded the doctrine of field preemption far beyond the prior holdings of this Court.

As Judge Pregerson of the Ninth Circuit pointed out in his dissent, § 354.3 does not target former enemies of the United States. The Federal Government does not make or resolve war with museums and galleries, the only entities at issue under § 354.3. App. 37a-38a. As Judge Pregerson also noted, § 354.3 does not provide for war reparations against a foreign government that looted artworks; it merely provides a statute of limitations for proceeding against a museum or gallery currently in possession of Nazi-looted art. App. 37a-38a. Notably, in *Alperin v. Vatican Bank*, the Ninth Circuit found that

"[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Id.*, 410 F.3d 532, 551 (9th Cir. 2005). This decision simply cannot be reconciled with the Ninth Circuit's decision in *Von Saher* that a statute of limitations for property stolen during wartime is preempted by the Constitution's commitment of war reparations to the Federal Government.

Contrary to the Ninth Circuit's conclusion, providing relief to Holocaust victims does not necessarily involve the resolution of war or invoke foreign affairs. Not every statute that furnishes relief to Holocaust victims is the equivalent of extracting reparations from wartime enemies. Indeed, since the Ninth Circuit found § 354.3 unconstitutional because it aims to rectify war wrongs, the seventeen state statutes that toll statutes of limitations during wartime[5] may also be at risk as these statutes could apply to foreign defendants. In fact, there are numerous state statutes that provide relief to Holocaust victims without implicating war reparations. For example, at least eleven states provide tax relief for Holocaust victims,[6] nineteen states have mandatory Holocaust education statutes,[7] and various states have other miscellaneous

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5. *See, e.g.*, Cal. Code Civ. Proc. § 354 (2010); Ky. Rev. Stat. § 413.300 (2009); Minn. Stat. § 541.15(a)(3) (2010); N.Y. C.P.L.R. § 209 (2010); N.C. Gen. Stat. § 1-34 (2009).

6. *See, e.g.*, Cal. Rev. & Tax Code §§ 17131.1 & 17155 (2010); Conn. Gen. Stat. §§ 1-11 & 12-701 (2009); Ind. Code Ann. § 6-3-1-30 (2010); Va. Code Ann. § 58.1-322 (2010).

7. *See, e.g.*, Cal. Ed. Code §§ 44776.2 & 51220 (2010); Conn. Gen. Stat. § 10-16b (2009); Fla. Stat. § 1003.42 (2010); O.C.G.A. § 50-12-130 (2009); 105 ILCS 5/27-20.3 (2010); Ind. Code Ann. § 20-30-5-7 (2010); Nev. Rev. Stat. Ann. § 233G.010 (2009).

Holocaust-related legislation.[8] Plainly, the majority interpreted § 354.3 far too broadly, finding that a statute that provides relief to Holocaust victims in the form of a revised statute of limitations equates to war reparations. The Ninth Circuit's decision in *Von Saher* leaves open to attack any state statute that provides relief to Holocaust victims as an impermissible intrusion upon the Federal Government's foreign affairs power.

Not only does § 354.3 have no bearing upon the federal war powers, a state statute extending the statute of limitations in cases to recover Nazi loot from the present possessors is in line with — indeed, a necessary corollary of — the position that the United States has consistently taken with respect to the restitution of Nazi-looted art: artworks looted by the Nazis should be identified and returned to their pre-War owners. *See Proceedings of the Washington Conference on Holocaust-Era Assets* (J.D. Bindenagel ed. 1999), *available at* http://www.state.gov/www/regions/eur/holocaust/heac.html; Stuart E. Eizenstat, *Imperfect Justice* 192-99 (2003); Kennedy, *The Role of the United States in Art Restitution*. But the United States has never implemented specific procedures to effectuate this position. Rather, it has left the victims to locate their property, make claims, try to resolve those claims through negotiation, and when they cannot do so, have the matter resolved in court. Kennedy, *The Role of the United States in Art Restitution*.

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8. *See, e.g.*, Estates and Trusts — Share of Other Heirs, Fla. Stat. § 732.103 (2010); Malicious Harassment, Wash. Rev. Code § 9A.36.078 (2009).

A critical component of this consistent U.S. position is that possessors of Nazi-looted art should be discouraged from asserting the statute of limitations and other technical defenses to prevent or impede the resolution of Holocaust claims on the merits. Indeed, in June 2009, when representatives of 46 countries (including the U.S.) met in Prague at a Holocaust-era assets conference, the head of the U.S. delegation, Ambassador Stuart Eizenstat, in his opening remarks addressed the critical issue of the statute of limitations in the context of the recovery of Nazi-looted art:

> I am also concerned by the tendency of holders of disputed art to seek refuge in statutes of limitation and laches defenses in order to block otherwise meritorious claims even in situations where the claimant has not been provided with provenance information. Given the nature of the Holocaust and the Cold War that followed, many families simply were unaware or only partially aware of their heritage. The difficulty in getting documentation and the uncertain nature of the current restitution process creates further uncertainty. For a defendant to take advantage of circumstances totally beyond the control of the claimant compounds the grotesque nature of the original crime.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference.*

At the conclusion of the Prague Conference, the participating nations, including the United States, adopted the *Terezin Declaration on Holocaust Era Assets and Related Issues*, which among other things urged "all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims. . . ." *Terezin Declaration* (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm. But the Federal Government has neither sought — nor indicated any intent to seek — the enactment of legislation at the federal level. Rather it has left to the states — through the exercise of their traditional state responsibility — the task of enacting legislation limiting the assertion of technical defenses in actions to recover property looted during the Holocaust, thereby allowing such claims to be heard on the merits.

The *Von Saher* decision, by striking down such a state statute, is in direct conflict with this express U.S. policy and, ironically, will have the effect of chilling efforts in other states to pass legislation critical to effectuate the Federal Government's dual goals of favoring the return of Holocaust property to the families of the victims from whom it was stolen and promoting the resolution of such claims on the merits.[9]

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9. Indeed, the *Von Saher* decision will encourage possessors of Nazi-looted art to seek refuge behind the statute of limitations, exactly what the Federal Government wishes to

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B. *Zschernig* And The Dormant Foreign Affairs Doctrine Should Be Reexamined In Light Of The *Von Saher* Decision

The dormant foreign affairs doctrine provides that states may not legislate in areas implicating foreign affairs, whether or not the Federal Government has acted with respect to the issue at hand. This doctrine springs from the Court's decision in *Zschernig*, 389 U.S. at 434-35. In *Zschernig*, Oregon's inheritance statute prohibited residents of foreign countries from inheriting from an Oregon estate unless the foreign government involved granted reciprocal rights and the inheritance would be free from confiscation. The Oregon statute thus invited the courts to delve into, and ultimately criticize, those governments — primarily communist bloc countries — under the guise of examining reciprocity and confiscation, and was, therefore, unconstitutional.

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avoid. For example, in *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009), a case involving Nazi-looted art that was subsequently purchased by Spain in 1993, the defendants argued that rehearing on the issue of whether prudential exhaustion should be read into the Foreign Sovereign Immunities Act should not have been granted, solely on the grounds that the case would have to be dismissed anyway because it is time-barred under the *Von Saher* decision. *See* Appellants-Defendants Kingdom of Spain and Thyssen-Bornemisza Collection Foundation's Response to Order to File Simultaneous Briefs as to Whether the Matter Should Be Heard En Banc, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009) (Nos. 06-56325 and 06-56406) (*available at* http://www.commartrecovery.org/docs/CassirervKingdomofSpain091027.pdf).

In *Von Saher*, the Ninth Circuit has taken foreign affairs field preemption farther than *Zschernig* and its progeny. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) ("[o]ther courts addressing the application of field preemption under *Zschernig* to situations where the conflict between state law and federal foreign policy is less clear than in *Garamendi* have shown reluctance to extend the [sic] *Zschernig*'s reach further.").

Zschernig, to the extent it has been applied by other courts, has been limited to those cases where states enact what amount to embargos or boycotts against foreign countries, the aim of which is to criticize policies of those governments and force political change. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (citing, *e.g. Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down tax provision which encouraged boycott of South Africa); *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating statute restricting state agencies from purchasing goods or services from companies doing business with Burma); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (striking down policy of excluding Iranian students in retaliation for hostage crisis).)

As the district court noted in *Central Valley*, the state statutes that the Court invalidated in *Zschernig, Crosby*, and *Garamendi* were all "aimed directly at a foreign country" and were "aimed directly at some aspect of that foreign country's conduct that was the subject of United States foreign policy activity." *Central*

Valley, 529 F. Supp. 2d at 1188. The same can be said for the statute invalidated by the Ninth Circuit in *Deutsch* as only particular foreign countries used slave labor during WWII. *Id.*, 324 F.3d at 703-04.

Section 354.3 is not aimed at any foreign countries at all. It is completely neutral in its application to any museum or gallery in possession of Nazi-looted art, whether that museum be located in California, another state, an allied country or a former wartime enemy. It is aimed at museums in possession of looted art without regard to how the museum came to be in possession. If there should ever be an occasion where § 354.3 is applied to a museum or gallery located in a foreign country because the facts in that case would permit California to assert jurisdiction over that entity, the effect on foreign affairs would be purely incidental just as in any case where jurisdiction over foreign entities can be obtained. But, even *Zschernig* recognizes that a statute must have more than an incidental effect to conflict with the foreign affairs power. *Id.*, 389 U.S. at 434-435. Indeed, it appears that the instant case is the only one to apply the foreign affairs field preemption doctrine set forth in *Zschernig* to invalidate a statute that is not "aimed directly at a foreign country." *Central Valley*, 529 F. Supp. 2d at 1188.

Four members of the Court dissented in *Garamendi*, finding that the presidential policy of deference to the ICHEIC was not a sufficiently clear conflict with California's state law to warrant preemption. *Id.*, 539 U.S. at 430. The dissent particularly noted: "We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here." At least to the four

dissenters, *Zschernig* and the notion of "dormant foreign affairs preemption" may survive only when the state acts to criticize a foreign government. *Garamendi*, 539 U.S. at 439 (Justice Ginsburg, joined by Justice Stevens, Scalia, and Thomas, dissenting). Indeed, even the majority in *Garamendi* struggled with *Zschernig* and turned to the concurring and dissenting opinions in that decision to analyze the scope of foreign affairs field preemption.

Far from affirming *Zschernig*, *Garamendi* is seen as a limit on the broad dormant foreign affairs doctrine. *See* Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. Pa. J. Int'l L. 823, 880 (2009) (*Garamendi* "f[e]ll short of endorsing *Zschernig*'s view of preclusive exclusivity"); Jeremy K. Schrag, Note, *Federal Framework for Regulating the Growing International Presence of the Several States*, 48 Washburn L.J. 425, 436-37 (2009) (*Garamendi* "arguably abandoned the broad approach established in *Zschernig*, which seemingly provided for a thick blanket of federal foreign affairs power"). Rather than struggling to rationalize *Zschernig*, as the majority did in *Garamendi*, we submit that it is time for the Court to recognize the confusion that *Zschernig* has caused and expressly limit its breadth to state statutes that directly criticize foreign governments.[10]

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10. *Medellín v. Texas*, 552 U.S. 491 (2008) is seen as a further narrowing of the foreign affairs preemption doctrine upheld in *Garamendi*. In *Medellín*, the Court made clear that the preemptive effect given to the President's express policy of favoring the ICHEIC over state remedies in *Garamendi* was

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Here, where no foreign affairs policy or interest of Congress or the President can be identified, the Ninth Circuit relied solely on the broadest type of dormant foreign affairs preemption in holding that a statute of limitations, being applied by a California court to a California museum, is unconstitutional. In an effort to explain how a statute of limitations for the recovery of art in the possession of museums and galleries affects foreign affairs, and therefore falls within the *Zschernig* rubric, the Ninth Circuit concluded that "[i]n order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch Government and courts." App. 28a. The fact remains, however, that in accordance with the Ninth Circuit's decision, Ms. von Saher can continue her lawsuit under the limitations provision provided by California's general statute of limitations,[11] and if she can establish that her claim is timely under that provision, a court in California will still have to review the Dutch Government's actions with respect to the Cranachs. Thus, it is not § 354.3

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based on "a narrow set of circumstances: the making of executive agreements to settle litigation claims between American citizens and foreign governments or foreign nationals" (*Medellin*, 552 U.S. at 531), and not upon a more sweeping recognition that the President's power to conduct foreign affairs preempts state law. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 331-32 (2009).

11. Petitioner was granted leave to amend her complaint to allege the lack of reasonable notice to establish diligence under Cal. Code Civ. Proc. § 338, the general statute of limitations for actions for the recovery of stolen property. App. 35a.

that would require California courts to review acts of restitution by foreign governments, but rather the particular facts in this case. Section 354.3's effect on foreign affairs is purely incidental, based upon unusual facts in a particular case and not upon the statute itself. Even under *Zschernig*, a statute must have more than an incidental effect on foreign affairs to conflict with the field of foreign affairs. *Id.* 389 U.S. at 434-35.

III. The Ninth Circuit Failed To Apply The Rule That A Statute Should Not Be Struck Down As Facially Unconstitutional When A Suitable Limiting Construction, Applicable In The Case At Bar, Is Available

"[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Courts must not seek out conflicts between state and federal regulation where none clearly exists. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court should not speculate about the effects of a statute in hypothetical cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

In this case, the Ninth Circuit concluded that, had § 354.3 been limited to museums and galleries located

in California, there would be no question that the California Legislature had been acting within its traditional state interest, and § 354.3 would have been held constitutional. App. 23a. This leads to a most unusual circumstance. As this case is brought against a museum located in California, based upon the Ninth Circuit's logic, § 354.3 as applied here should not be unconstitutional.

A facial challenge to the constitutionality of a law can only succeed where it is established that no set of facts exists under which the Act would be valid. *Washington State Grange*, 552 U.S. at 449. When confronted with a constitutional flaw in a statute, the Supreme Court will "try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force[.]" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). The "'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise be left intact.'" *Id.* at 329 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)).

In this case, the Ninth Circuit found that if § 354.3 were limited to museums and galleries physically located in the state, it would be constitutional. If this is correct, the proper remedy here would not be a finding of facial unconstitutionality, but rather an injunction against the unconstitutional application, leaving the application to museums and galleries in California — including Respondents — in place.

This remedy is particularly appropriate here, as § 354.3 was passed by a unanimous California Legislature and has received the support of California's Attorney General throughout these legal proceedings. A ruling of facial unconstitutionality in this case clearly "frustrates the intent of the elected representatives of the people" of California. *Ayotte*, 546 U.S. at 329; *Washington State Grange*, 552 U.S. at 451. Likewise, there can be no doubt that the California Legislature would prefer a partially intact § 354.3 that applies to museums and galleries located in California to no statute at all, given that the original bill for § 354.3 proposed such language. App. 23a-24a. *See Ayotte*, 546 U.S. at 330 (court must ask if legislature would prefer what is left of statute to no statute at all).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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